IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 103/2006

1. Shri John Joseph Rebello,
son of Silvester Rebello, aged 55 years,
Occupation service, residing
at H.No.186/A, Dagoale Baixo,
Mina Curtorim, Taluka Salcete, Goa.

2. Smt. Infra Estella Rebello,
wife of the Appellant No.1,
aged 42 years, occupation housewife,
residing at Hl.No.186/A, Dagoale Baixo
Maina Curtorim Taluka, Salcete, Goa. ..... Appellants.

V/s.

1. Shri Diogo Fernandes,
son of Shri Laurence Fernandes,
of major age, occupation self employed,
resident of H. No.101, Tambetim,
Maina Curtorim, Salcete, Goa.

2. Smt. Maria Angela Fernandes,
of major age, occupation housewife,
resident of H.No.101, Tambetim,
Maina Curtorim, Salcete, Goa. ..... Respondents.

Mr. Sudesh Usgaonkar, Advocate for the appellants.

Mr. C. A Coutinho, Advocate for the respondents.

CORAM : S.K. SHAH, J.

DATE : 17TH JANUARY, 2007.

ORAL JUDGMENT :

Heard Advocates on both sides. The appeal is admitted on the substantial question of law being whether the appellate Court was right in dismissing the appeal without considering the documentary evidence produced by the appellants at the stage of appeal ? The appeal is finally heard by consent of the parties.

2. It appears that the appellants/plaintiffs purchased the property under Sale Deed dated 21.10.1975. The sale deed indicated that the property sold under the sale deed being the plot admeasuring 2100 sq. metres. The boundaries of the plot are also mentioned in the sale deed. The sale deed stipulates that "The said plot has been demarcated as shown in plan presented in duplicate with this deed and having an area of 2100 square metres represents 2100/8400 of the property." This makes it clear that the plaintiffs/appellants had purchased an area of 2100 sq. metres having boundaries indicated in the sale deed and the plot was demarcated as shown in the plan annexed to the sale deed.

3. What happened was that at the appellate Stage, the appellate Court allowed the plaintiffs to produce two other sale deeds to indicate the area of plots under those sale deeds so as to show the boundaries of the plot purchased by the plaintiffs. Evidence was also led in that regard

before the lower appellate Court. After the evidence was led, the plan concerning the plaintiffs' sale deed was allowed to be produced and that was taken on record and marked Exhibit – 20 along with application Exhibit 19. It appears that this plan was not taken into consideration by the lower appellate Court. The plan, in fact, appears to be part of the sale deed. It demarcates the plot, particularly the area, of which boundaries are given in the sale deed.

4. It, however, appears that though the plan was on record before the lower appellate Court, no evidence was led by the plaintiffs to prove that plan and probably, therefore, the lower appellate Court did not take into consideration the same. However, as indicated above, the plan is in fact a part and parcel of the sale deed, under which the plot was purchased by the plaintiffs and, therefore, without consideration of the said plan, the issue cannot be decided. As such, it is necessary to remand the matter to the lower appellate Court for recording the evidence with regard to the plan and after recording the same, decide the appeal afresh. While deciding the appeal afresh, it is necessary for the lower appellate Court to take into consideration the entire evidence on record.

5. As such, the appeal is allowed and the Judgment and Decree

passed by the lower appellate Court is, hereby, set aside and the matter is remanded to the lower appellate Court for deciding the appeal afresh, after giving opportunity to the plaintiffs to lead evidence with regard to the plan referred to in the sale deed under which the plaintiffs purchased the plot. If necessary, the defendants also be given opportunity to lead evidence on their side, limited to the evidence with regard to the plan. The lower appellate Court to decide the appeal afresh after considering the plan, sale deed and the entire evidence that is available on record.

S.K. SHAH, J.

ssm.